IN THE HIGH COURT OF BOMBAY AT GOA
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SECOND APPEAL NO. 10 OF 2002

1. Rosalina Fernandes,
widow of Domingos
Fernandes, major,
landlady,

2. Luis Fernandes, son
of Domingos Fernandes,
bachelor, major,
both r/o Corpil,
Azossim, Ilhas, Goa. ... Appellants.

Versus

1. Jebelina Pereira,
major, widow of Minguel
Fernandes, landlady,
residing at Azossim, Ilhas,
Goa (since deceased),
through Legal representatives:

a. Milagrina D'Sa,
b. Rosa D'Sa Fernandes,
c. Remedio Fernandes,
d. Kum. Perpetua D'Sa,
e. Assumcao Fernandes,
all residents of Near Bar
Soares, Mandur, Neura,
Tiswadi, Goa,

f. Julia Monfa Fernandes
(since deceased) through
legal representatives:
f.(i) Miss Precila Fernandes,
f.(ii) Mr. Mario Fernandes,
f.(iii) Mr. Fernando Fernandes
(dismissed against this repondent
as per Order dt.9.7.2004 of this
Hon'ble Court),
all residents of Feilenhauserweg 3,
42859 Remacheid, Germany,

2. Florina Fernandes,
major, married, landlady,
housewife, r/o H.No.79,
P.O. Neura, Corpil,
Azossim, Goa,

3. Milagres D'Cunha,
major, married, landlord,

r/o Azossim, Ilhas, Goa
(since deceased) through
legal representatives:

a) Piedade Jaime D'Cunha,
b) Mario Benedicto D'Cunha,
c) Jesus D'Cunha,
d) Perpetua D'Cunha,
e) Assecao D'Cunha,
f) Paulina D'Cunha,
all majors, r/o Corpil,
Azossim, P.O. Neura, Tiswadi,
Goa,

4. Santana Maria Fernandes,
major, married, landlady,
housewife,

5. Joaquim Pereira, major,
married, landlord, both
residing at Azossim,
Ilhas, Goa, and

6. Peter Fatima Fernandes,
major, bachelor, son of
Jeronimo Fernandes,
Ex-Sarpanch of Village
Panchayat of Azossim,
Mandur, Neura,
residing at Azossim,
Ilhas, Goa. ... Respondents.

Mr. Shivan Dessai, advocate for the appellants.

Mr. P. Rao, advocate for respondent nos. 1(a), (b), (c), (e),(f), (i) & (ii), 2, 3(b), (d), (e), 4, 5 and 6.

CORAM : B. H. MARLAPALLE, J.

DATE : 9th September, 2004.

ORAL ORDER

Heard Mr. Shivan Dessai, learned advocate for the appellants, who had moved Regular Civil Suit No.154/81/C before the learned Civil Judge, Junior Division at Panaji, for the relief of declaration and injunction. They had claimed the co-ownership in respect of the suit property known as "Xir" situated at Azossim in the ward Copir under survey

no.62/8. The trial Court framed specific issues regarding the easementary rights in relation to the access to the suit property and the alleged obstruction by the defendants, by erecting a masonry wall. An issue regarding non-joinder of necessary parties was also framed. On assessment of the evidence adduced by the plaintiffs, the trial Court held that the plaintiffs failed to prove that they had acquired easementary rights in relation to the suit access and construction of the house in the suit property, affecting air and light, the plaintiffs failed to prove that the defendants had obstructed the suit access by erecting a masonry wall and the suit also failed on the point of non-joinder of necessary parties. The trial Court was thus pleased to dismiss the suit by Judgment and Order dated 31st January, 2001, i.e after 20 years.

2. The plaintiffs therefore went in appeal by filing Regular Civil Appeal No.42/2001, which also came to be dismissed by the learned Additional District Judge at Panaji, vide Judgment and Order dated 19th September, 2001. Hence this Second Appeal.

3. It was the case of the plaintiffs that they had constructed the suit house in 1952 and, therefore, easementary rights were available to them for free access to air and light, etc. This plea was based on two documents which were obtained after the suit was filed. The first document is the

certificate no.1 of 1982, purportedly issued by the Panjim Municipal Council on 15th January, 1982, and the second document was also a certificate issued by the Village Panchayat of Azossim on 28th June, 1998. Thus alongwith the plaint no documentary proof was placed on record by the plaintiffs in support of their contention that the house was constructed in 1952. However, both the courts below referred to the gift deed which was executed on 15th July, 1969. This document had come on record in the oral evidence of P.W.1 and there was a reference in the same to the house having been constructed five years prior to the execution of the gift deed. The trial Court therefore noted that the suit house could have been constructed sometime in 1965 and thus when the suit was moved, a period of 20 years had not elapsed. This finding of the trial Court has been duly confirmed by the lower Appellate Court as well. The suit house is surveyed under no.62/8 and that of the defendants was under survey no.62/9. The documents which were sought to be relied upon by the plaintiffs and which were placed on record through the evidence of P.W.1, i.e. P.W.1/D and P.W.l/E, were required to be proved by examining an officer of the Municipal Council or the Village Panchayat, as the case may be. The title of the suit house originated from the gift deed and, therefore, the courts below did not commit any error in relying upon the gift deed executed on 15th July, 1969. The suit moved by the plaintiffs was solely on the basis that the house was constructed in 1952 and this plea has not been accepted by

both the courts below, on the ground that there was no documentary proof in support of this contention and, on the contrary, the gift deed indicated that the house was constructed in 1965. The findings recorded by the courts below are findings of fact and they do not suffer from any infirmities.

4. There is no substantial question of law involved in this Second Appeal, and, therefore, the same is dismissed in limine.

B. H. MARLAPALLE, J.

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